87-330

No.

Supreme Court, U.S.
FILED
AUG 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

JOHN MARTIN-MUSUMECI,
Petitioner,

vs.

RODERICK L. CRAMER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

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August 25, 1987

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QUESTIONS PRESENTED FOR REVIEW

1. Whether state law or federal law controls the issue of a defendant's right to enforce an arbitration agreement involving commerce to which he is not a party but which by its terms encompasses the plaintiffs' claims against him.

2. Whether a state court violates the Federal Arbitration Act by refusing to compel arbitration of certain disputes, which are within the scope of an arbitration clause in a contract involving commerce, on the ground that the party seeking to compel arbitration was not a signatory to the contract.

3. Whether a state court violates the Federal Arbitration Act by refusing to compel arbitration of certain disputes, which are within the scope of an arbitration clause in a contract involving commerce, on the ground that the parties seeking to resist arbitration did not demonstrate a specific intention to waive their right to a jury trial of their disputes with the party seeking to compel arbitration.

LIST OF PARTIES

This petition relates to six separate but identical proceedings in which petitioner was the appellant before the court below. Each respondent named herein was a respondent in one of those six proceedings. The parties to the proceedings below were the petitioner herein, John Martin-Musumeci, and respondents herein as follows: Roderick L. Cramer, Bona Dee Cramer, Beriyth Corporation (Appeal No. A034241); Microsource, Inc., Kelly Bryan, Martha Bryan, Joseph Knesz, Alma Knesz (Appeal No. A034243); J.D. Wessling, Caroline Wessling, Wesscomp, Inc. (Appeal No. A034498); Gordon C. Johnson, Allen S. Peterson, Western Compuware, Inc. (Appeal No. A034499); William E. Hart, Jimmy H. Dunne, Hart's, Inc. (Appeal No. A034502); Softcomp, Inc., Pat Connoly, Tom Tejerian (Appeal No. A034503).

All parties to the proceedings below are before this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Proceedings Before the Superior Court	3
B. Proceedings Before the Court of Appeal	4
REASONS FOR GRANTING THE WRIT	6
I	
The California Court of Appeal's Decision Would Categorically Deny the Benefit of the Federal Arbitration Act to Employees of Parties to Arbitration Agreements. The Decision:	
(a) Conflicts with Decisions of the Federal Courts of Appeals;	
(b) Disregards the Federal Policy Favoring Arbitration; and	
(c) Nullifies the Federal Arbitration Act as to Claims Brought Against Employees in State Court	6
II	
The Instant Disputes Are Within the Scope of the Arbitration Provisions	8
III	
The Plea of Denial of Jury Trial Is Not a Permissible Ground for Refusing to Enforce the Arbitration Agreement	10

TABLE OF AUTHORITIES

Cases

Page(s)

Amoco Transport Co. v. Bugsier Reederei & Bergungs, A.G., (In re Oil Spill by the ("Amoco Cadiz"), 659 F.2d 789 (7th Cir. 1981) 9

Banque de Paris et des Pays-Bas v. Amoco Oil Co., 573 F.Supp. 1464 (S.D.N.Y. 1983) 8

Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985) 7

Bayma v. Smith Barney, Harris Upham & Co., 784 F.2d 1023 (9th Cir. 1986) 7, 11

Bhatia v. Johnston, 818 F.2d 418 (5th Cir. 1987) 7

Brown v. Dean Witter Reynolds, Inc., 601 F.Supp. 641 (S.D. Fla. 1985) 7

Foster v. Turley, 808 F.2d 38 (10th Cir. 1986) 7

Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2d Cir. 1987) 7

Goodwin v. Elkins & Co., 730 F.2d 99, 108 (3d Cir. 1984) 7

Hart Ski Mfg. Co. v. Maschinenfabrik Hennecke, GmbH (In re Hart Ski Mfg. Co.), 711 F.2d 845 (8th Cir. 1983) 8

Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370 (8th Cir. 1983) 7

Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185 (9th Cir. 1986) 6, 7

Management Recruiters of Albany, Inc. v. Management Recruiters Int'l, Inc., 643 F.Supp. 750 (N.D.N.Y. 1986) 8

Mercury Constr. Corp. v. Moses H. Cone Mem. Hosp. (In re Mercury Constr. Corp.), 656 F.2d 933 (4th Cir. 1981) 8

Merrill Lynch, Pierce Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286 (8th Cir. 1984) 7

TABLE OF AUTHORITIES

CASES

Page(s)

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985) 7

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 ..... 7, 11

Okcuoglu v. Hess, Grant & Co., 580 F.Supp. 749 (E.D. Pa. 1984) 7

Oriental Commercial & Shipping v. Rosseel, N.V., 609 F.Supp. 75 (S.D.N.Y. 1985) 8

Perry v. Thomas, 107 S.Ct. 2520, 96 L. Ed. 2d 426, 55 U.S.L.W. 4832 (U.S. June 15, 1987) 6, 11

Southland Corp. v. Keating, 465 U.S. 1 (1984) 6, 7, 10

Steinberg v. Illinois Co., 635 F.Supp. 615 (N.D. Ill. 1986) 7

Webb v. R. Rowland & Co., 800 F.2d 803 (8th Cir. 1986) 7

Statutes

9 U.S.C. §§ 1 et seq. 3

No.

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OCTOBER TERM, 1987

JOHN MARTIN-MUSUMECI,
Petitioner,

vs.

RODERICK L. CRAMER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

The petitioner John Martin-Musumeci respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, entered in the above-entitled related proceedings on March 12, 1987.[1]

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, as modified, is reprinted in the appendix hereto, pp. 1A-7A, *infra*. The original opinion of the California Court of Appeal, modified in connection with the denial of petitioner's petition for rehearing, is reprinted in the appendix hereto, pp. 8A-12A, *infra*. The unpublished statement of decision of the California Superior

[1] On May 27, 1987, the California Supreme Court entered its order denying petitioner's petition for review of the judgment and opinion of the Court of Appeal.

Court for the County of Alameda is reprinted in the appendix hereto, pp. 16A-20A, *infra*.[2]

JURISDICTION

The judgment of the California Court of Appeal, First Appellate District ("the Court of Appeal"), was entered on March 12, 1987, affirming the order dated December 31, 1985 denying petitioner's petition to compel arbitration. The Court of Appeal denied a timely petition for rehearing and modified its opinion on April 10, 1987. Thereafter, on May 27, 1987, the Supreme Court of California denied a timely petition for review. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case involves the Federal Arbitration Act, Title 9, United States Code, §§ 2, 3, and 4, the text of which is set forth in the appendix. *See* pp. 21A-22A, *infra*.

STATEMENT OF THE CASE

In 1983, petitioner, acting at all relevant times as president and disclosed agent of Softsmith Corporation (hereinafter "Softsmith"), negotiated a series of substantially identical franchise agreements (hereinafter "the Agreements") between respondents and Softsmith. Clerk's Transcript on Appeal, hereinafter "C.T.", at 63-65, 73, 135-36. The Agreements contained an arbitration provision which provided, in relevant part:

> Any controversy, dispute or claim arising out of or relating to this Agreement, performance hereunder, or breach hereof, excepting as described below, shall be settled by arbitration . . . . " C.T. at 102.

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[2] Petitioner reprints the opinions and statement of decision entered in *Roderick S. Cramer, et al. v. John Martin-Musumeci, et al.*, one of the six related cases affected by this petition. The opinions and statement of decision in the other five related cases are identical to those in the *Cramer* case.

Because of a general downturn in the computer industry, Softsmith was unable to continue doing business and filed for bankruptcy protection. As a result, it was unable to perform its obligations under the Agreements. Unable to sue Softsmith directly because of the pendency of bankruptcy proceedings, respondents instead sued petitioner personally, as Softsmith's president and agent.

Respondents brought actions in Superior Court alleging that, while representing Softsmith during negotiation of the Agreements with respondents, petitioner made various misrepresentations and material omissions. C.T. at 137-46. Respondents' complaints allege:

> 5. At all times material hereto, defendant John Martin-Musumeci was the president, principal and director of Softsmith Corporation, plaintiffs' franchisor.
>
> 6. Defendant John Martin-Musumeci at all times material hereto, was an employee, officer, director and principal of Softsmith Corporation, who actually, and as a matter of law, participated in each and every act of misconduct alleged herein. C.T. at 135-36.

The substance of these alleged misrepresentations and omissions primarily concerned the nature of the performance that petitioner and Softsmith would render pursuant to the Agreements. *Id.* The gravamen of each of respondents' actions is that petitioner and Softsmith failed to perform under the Agreement in a manner consistent with representations made during the negotiations. *Id.*

A. Proceedings Before the Superior Court

Petitioner petitioned the Superior Court to compel arbitration of respondents' claims on the ground that they are all comprehended within the arbitration provision contained in the Agreements. C.T. at 113. Respondents opposed the petition on the ground that petitioner is neither named in nor a signatory to the Agreements. C.T. at 61-63. Petitioner argued before the Superior Court that arbitration of the instant dispute is mandated by federal law pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and cases decided thereunder. C.T. at 39-47, 118.

The Superior Court denied petitioner's petition. See pp. 14A-15A, *infra*. The court held that its decision was governed by state, not federal, law, and that it was unnecessary for it to decide whether the Agreements involve "commerce" for purposes of the Federal Arbitration Act. *See* pp. 19A-20A, *infra*. The court held, under state law, that the arbitration provision is applicable only to disputes between named parties to the Agreements. *See* pp. 16A-17A, *infra*. The court specifically held that one who is not a named party to the Agreements cannot compel arbitration under the arbitration provision, even if the party seeking to avoid arbitration is a party to one of the Agreements. *See* pp. 17A-18A, *infra*.

B. Proceedings Before the Court of Appeal

Petitioner appealed the Superior Court's decision on the ground that it is contrary to controlling federal law. *See* Appellant's Opening Brief at 4-16; Appellant's Reply Brief at 11-16. Respondents opposed petitioner's appeal on the ground that a nonparty to the Agreements is automatically precluded, as a matter of California and federal law, from enforcing the arbitration provisions. *See* Respondents' Brief. The Court of Appeal affirmed the order of the Superior Court. *See* pp. 2A-12A, *infra*.

The Court of Appeal held that respondents can be compelled to arbitrate this dispute only if it can be found that they specifically intended to waive their constitutional right to a jury trial when they signed the Agreements. *See* pp. 3A-4A, *infra*. The Court of Appeal concluded that since petitioner is not a party to the Agreements, respondents therefore did not intend to waive their constitutional right to a jury trial as to disputes with petitioner and for that reason cannot be compelled to arbitrate these disputes.[3]

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[3] The Court of Appeal originally based its affirmance on the ground that the record on appeal was inadequate to permit reversal of the Superior Court's order denying the petition. *See* pp. 10A-11A, *infra*. In its modified opinion, issued after petitioner's unsuccessful petition for rehearing, the Court of Appeal abandoned this ground. Instead the court held that petitioner's status as a nonparty to the Agreements, determined under rules of contract interpretation, means *ipso facto* that respondents did not agree to arbitrate this dispute. *See* pp. 4A-6A, *infra*.

See pp. 3A-6A, *infra*. The Court of Appeal held that the Federal Arbitration Act and federal precedents decided thereunder are inapplicable because the Superior Court made a threshold finding, as a matter of California law, that no agreement to arbitrate exists "between the disputing parties." *See* p. 6A, *infra*.

The Court of Appeal purported to distinguish California cases which allow a nonparty to an agreement to enforce an arbitration provision contained in the agreement.[4] The court stated that those cases involved conduct by the nonparty in performing under the agreement as an agent of a party to the agreement. The Court of Appeal viewed respondents' complaints, by contrast, as not alleging that petitioner acted as agent for Softsmith. The court concluded that the arbitration provisions in the Agreements therefore do not encompass respondents' claims against petitioner. *See* pp. 5A-6A, *infra*. In fact, the court concluded, if respondents were to concede that they are suing petitioner as an agent of Softsmith they would therefore be subject to the arbitration provision. *See* pp. 6A-7A, *infra*.

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[4] The Court of Appeal declined to discuss federal case law, cited by petitioner, which also holds that a nonparty to an arbitration agreement can enforce that agreement against a signatory. *See* Appellant's Opening Brief at 4-16; Appellant's Reply Brief at 11-16.

REASONS FOR GRANTING THE WRIT

I

THE CALIFORNIA COURT OF APPEAL'S DECISION WOULD CATEGORICALLY DENY THE BENEFIT OF THE FEDERAL ARBITRATION ACT TO EMPLOYEES OF PARTIES TO ARBITRATION AGREEMENTS. THE DECISION:

(a) Conflicts With Decisions of the Federal Circuit Courts of Appeals;

(b) Disregards the Federal Policy Favoring Arbitration; and

(c) Nullifies the Federal Arbitration Act As to Claims Brought Against Employees in State Court.

The Court of Appeal held, as a matter of state law, that a nonparty employee may not enforce an arbitration agreement. *See* p. 6A, *infra*. This holding is directly contrary to decisions of United States Circuit Courts of Appeals in California and elsewhere which expressly hold, as a matter of federal law, that an employee, in a position substantially identical to petitioner's, who is a nonsignatory to his employer's arbitration agreement, has the right, under the Federal Arbitration Act, to enforce the agreement.[5] *See Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986) (as a matter of substantive federal law, nonsignatory brokerage employees permitted to invoke arbitration

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[5] This Court has never actually decided the issue of the right of a nonparty to enforce an arbitration agreement. This issue was raised by the respondent in *Perry v. Thomas*, 107 S.Ct. 2520, 96 L.Ed.2d 426, 55 U.S.L.W. 4832 (U.S. June 15, 1987), but this Court declined to reach the issue because it had been raised for the first time on appeal. *Id.* at 4834. In dictum, this Court implied that state law might control the issue "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 4835 n.9 (emphasis in original). In reality, however, the validity, revocability, or enforceability of the arbitration provisions is not in issue here. Rather, the issue here, governed by federal substantive law, is whether the instant disputes are comprehended within the expressed scope of the arbitration agreement. *Cf., e.g., Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *see* discussion *infra*.

clause in customer agreement as to claims related to handling of securities); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 937-39 (3d Cir. 1985) (as a matter of federal law, nonsignatory brokerage employees permitted to enforce arbitration agreements to which they voluntarily submit); *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1288-89 (8th Cir. 1984) (nonsignatory ex-employees of brokerage permitted to enforce arbitration agreement between brokerage and stock exchange); *accord Steinberg v. Illinois Co.*, 635 F. Supp. 615, 617 (N.D. Ill. 1986); *Brown v. Dean Witter Reynolds, Inc.*, 601 F.Supp. 641, 644 (S.D. Fla. 1985); *Okcuoglu v. Hess, Grant & Co.*, 580 F.Supp. 749, 751-53 (E.D. Pa. 1984).

The Federal Arbitration Act expresses a strong federal policy favoring enforcement of arbitration agreements, and prohibits states from denying arbitration of a dispute that is within the scope of such an agreement. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed.2d 444, 454-55 (1985). The Court of Appeal concluded that the Federal Arbitration Act was inapplicable to this case because it had decided under *state* law that no contract exists "between the disputing parties." *See* p. 6A, *infra*. However, this Court, and the courts of appeals for several circuits, have expressly held that the arbitrability of a particular dispute is determined according to federal substantive law.[6] In light of these decisions, it would

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[6] See *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983); *accord Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L. Ed. 2d 444, 454-55 (1985); *see also Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir. 1987); *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 806-07 (8th Cir. 1986); *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1024-25 (9th Cir. 1986); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 937 (3d Cir. 1985); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984); *Johnson Controls, Inc. v. City of*

appear that the Court of Appeal's reliance on three district court decisions to the contrary was misplaced. *See id.*

The Court of Appeal's decision would fortuitously deny enforcement of an arbitration agreement in those cases where an employee of a party to the agreement is available to be sued in state court, even though the dispute is plainly within the scope of the arbitration agreement. If this decision is allowed to remain in force, it will cause a frustration of the purpose of the Federal Arbitration Act in a wide range of cases.

II

THE INSTANT DISPUTES ARE WITHIN THE SCOPE OF THE ARBITRATION PROVISIONS

The bulk of respondents' allegations against petitioner can be summarized as follows: Martin was president, principal, director, and employee of Softsmith, who "actually, and *as a matter of law*, participated in each and every act of misconduct alleged herein." *See* Complaint, C.T. at 135-36 (emphasis added). Clearly, petitioner was acting as the agent of Softsmith in all dealings with respondents, and respondents based their arguments before the trial court on that assumption. *See* C.T. at 72-75. A corporation can by its very nature act only through its agents. Petitioner necessarily conducted the negotiation of the Agreements on behalf of Softsmith as its disclosed agent.

While negotiating on behalf of Softsmith, Petitioner allegedly made misrepresentations or material omissions which induced respondents to enter into the Agreements. The alleged misrepresentations primarily concerned obligations and expectations peti-

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Cedar Rapids, 713 F.2d 370, 373 (8th Cir. 1983); *Hart Ski Mfg. Co. v. Maschinenfabrik Hennecke, GmbH (In re Hart Ski Mfg. Co.)*, 711 F.2d 845, 846 (8th Cir. 1983); *Mercury Constr. Corp. v. Moses H. Cone Mem. Hosp. (In re Mercury Constr. Corp.)*, 656 F.2d 933, 938, 940, 942, 846 (4th Cir. 1981); *accord Management Recruiters of Albany, Inc. v. Management Recruiters Int'l, Inc.*, 643 F.Supp. 750, 752 (N.D.N.Y. 1986); *Oriental Commercial & Shipping v. Rosseel, N.V.*, 609 F.Supp. 75, 78 (S.D.N.Y. 1985); *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F.Supp. 1464, 1467-69 (S.D.N.Y. 1983).

tioner and/or Softsmith were to have fulfilled during the course of their performance of the Agreements. These included representations regarding projected franchise earnings and profitability; capitalization of and financial resources available to Softsmith; inventory respondents would need to buy and would be able to sell as franchisees; products and services that Softsmith would provide to respondents pursuant to the Agreements; and so on. Many of the alleged representations consisted of promises the performance of which depended entirely on Softsmith, an acknowledged party to the Agreements. *See* Complaint, C.T. at 136-43. But for the inability of Softsmith to perform its obligations under the Agreements as was originally anticipated, respondents would have no complaint and this litigation would not exist.

By signing the Agreements, all respondents entered into a written agreement to arbitrate "any controversy, dispute or claim arising out of or relating to this Agreement, performance hereunder or breach hereof . . . ." C.T. at 102. Thus respondents expressly agreed to submit to arbitration *any* controversy even so much as *related* to the Agreements. Respondents claims against petitioner clearly meet this definition and should therefore be submitted to arbitration.

The issue of whether respondents can be compelled to arbitrate their disputes with petitioner should not be resolved, as it was by the Court of Appeal, on the superficial, simplistic basis that petitioner was not expressly named in the Agreements. This would permit a triumph of form over substance, and an evasion of respondents' obligation under the Federal Arbitration Act to honor their agreement to arbitrate. As the Seventh Circuit held in *Amoco Transport Co. v. Bugsier Reederei & Bergungs, A.G., (In re Oil Spill by the "Amoco Cadiz")*, 659 F.2d 789, 794 (7th Cir. 1981):

> Whether a particular claim is arbitrable depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause. Were the rule otherwise, a party could frustrate any agreement to arbitrate simply by the manner in which it framed its claims. *Id.* at 794.

Since Respondents' claims clearly arise out of and are related to the Agreements, they should be submitted to arbitration.

III

THE PLEA OF DENIAL OF JURY TRIAL IS NOT A PERMISSIBLE GROUND FOR REFUSING TO ENFORCE THE ARBITRATION AGREEMENT

The Court of Appeal prefaced its discussion of the arbitrability of the instant disputes by observing that the California Constitution guarantees to respondents the right to a jury trial. The court stated that petitioner "contends that respondents waived their right to jury trial against him on the instant causes of action by virtue of the arbitration provisions in their contracts with Softsmith."[7] *See* p. 3A, *infra*. Having thus framed the issue, the Court of Appeal concluded: "Whether [petitioner] can compel arbitration under the [Agreements] is dependent upon respondents' intent in executing them." *Id.*

The Court of Appeal's decision thus conditions enforcement of the arbitration agreements on a showing that respondents specifically intended to waive their right to a jury trial with respect to disputes with petitioner. In this way, the Court of Appeal would deny effect to the Federal Arbitration Act in all cases in which a party to an arbitration agreement fails to indicate a specific intent to waive his right to a jury trial as to disputes with a specific person which are otherwise within the scope of the arbitration agreement. This holding is impermissibly based on the unique nature of arbitration agreements, i.e., that they necessarily involve a waiver of the right to a jury trial.

In *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1983), this Court held: "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agree-

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[7] The Court of Appeal was mistaken in this regard. In reality, neither petitioner nor respondents raised the issue of the right to a jury trial or any waiver thereof at any time before the courts below. This issue was raised by the Court of Appeal sua sponte.

ments." In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), this Court held:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

In *Perry v. Thomas*, 55 U.S.L.W. 4832 (U.S. June 15, 1987), after reviewing the foregoing decisions, this Court distilled the following rule:

> A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the *uniqueness of an agreement to arbitrate* as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot. Id. at 4835 n.9 (emphasis added).

In *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023 (9th Cir. 1986), the Ninth Circuit reviewed the same precedents and reached an identical conclusion:

> The clear teaching of the Supreme Court is that 9 U.S.C. § 2 (1982) does not permit state law to carve out exceptions from arbitration merely because the state may prefer to have its citizens present their controversies in the court system. If the contract is one "involving commerce," then the question of arbitrability is controlled by federal law, and not by state law. *Id.* at 1025.

A waiver of the right to jury trial is inherent in all arbitration agreements. Thus by creating special obstacles to enforcement of an arbitration agreement where a waiver of the right to jury trial is implicated, Court of Appeal's decision carves out an exception to the Federal Arbitration Act so broad as to completely eviscerate the Act in the state courts.

DATED: August 25, 1987

Respectfully Submitted,

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(Appendices to Follow)

CONTENTS OF APPENDIX

	Page
Order Denying Petition for Rehearing and Modifying Opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, Filed April 10, 1987	1A
Modified Opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, Filed April 10, 1987	2A
Opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, Filed March 12, 1987	8A
Order of the Supreme Court of the State of California Denying Appellant's Petition for Review, Filed May 27, 1987	13A
Order Denying Defendant's Petition to Compel Arbitration and Stay Proceedings of the Superior Court of the State of California, County of Alameda, Filed December 31, 1986	14A
Statement of Decision of the Superior Court of the State of California, County of Alameda, Filed January 23, 1987	16A
9 U.S.C. §§ 2, 3, 4	21A

Appendix A

In the Court of Appeal of the State of California
First Appellate District
Division Five

A034243

Roderick L. Cramer et al.,
Plaintiffs and Respondents,

v.

John Martin-Musumeci,
Defendants and Appellants.

Order Modifying Opinion and
Denying Petition for Rehearing

Alameda County Superior Court
No. 599502-2

[Filed April 10, 1987]

By the Court:

It is ordered that the opinion filed herein on March 12, 1987, be modified as attached.

The petition for rehearing is denied.

LOW, P. J.
Low, P.J.

Dated April 10, 1987

Not to be Published in Official Reports

Appendix B

In the Court of Appeal of the State of California
First Appellate District
Division Five

A034243

Roderick L. Cramer et al.,
Plaintiffs and Respondents,

v.

John Martin-Musumeci,
Defendants and Appellants.

Opinion

Alameda County Superior Court
No. 599502-2

[Filed April 10, 1987]

Not to be Published in Official Reports

Defendant/appellant John Martin-Musumeci appeals from an order denying his petition to compel arbitration brought in response to plaintiffs/respondents' complaints for violation of the California Franchise Investment Act, negligent and intentional misrepresentation, and violation of the covenant of good faith and fair dealing.[1] Appellant contends the subject matter of respondents' actions is subject to arbitration under controlling federal

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[1] Six separate and virtually identical actions were filed against appellant. Plaintiffs/respondents in A034241 are Microsource, Inc., Kelly Bryan, Martha Bryan, Joseph Knesz and Alma Knesz; in A034243 Roderick L. Cramer, Bona Dee Cramer and Beriyth, a Virginia corporation; in A034498 J. D. Wessling, Caroline Wessling and Westcomp, Inc.; in A034499 Gordon C. Johnson, Allen S. Peterson and Western Compuware, Inc.; in A034502 William E. Hart, Jimmy H. Dunne and

law, and that denial of his petition would violate the public policy favoring arbitration. We modify our decision to correct a misinterpretation of the record on our part, and affirm.

Respondents' complaints generally allege that appellant, president of Softsmith Corporation, fraudulently induced them to enter into identical franchise agreements with Softsmith. The introductory clause of the agreements states: "This agreement is by and between Softsmith Corp., a California corporation, . . . and [name of franchisee]." Two of the six agreements were executed by appellant as president on behalf of Softsmith. Three were executed by the vice-president.[2] Softsmith is not named as a party defendant in the instant action. On the basis of an arbitration clause in the agreements, appellant demanded arbitration. After respondents refused to arbitrate, appellant filed an answer and petition to compel arbitration. The trial court denied the petition.

The right to a jury trial is guaranteed by Article I, section 16, of the California Constitution. Like most constitutional rights, it can be waived and appellant contends that respondents waived their right to jury trial against him on the instant causes of action by virtue of the arbitration provisions in their contracts with Softsmith. Respondents are suing appellant, who is not a party to the Softsmith contracts, for alleged misconduct occurring prior to the execution thereof. Whether appellant can compel arbitration under the Softsmith contracts is dependent upon respondents' intent in executing them.

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the

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Hart's Inc., a Delaware corporation; and in A034503 Softcomp Inc., Pat Connolly and Tom Tejerian.

[2] The partial copy of the agreement between Softsmith and respondent Softcomp in the record before us does not contain an execution by Softsmith, but appellant admits Softsmith entered into a written agreement with Softcomp.

controversy exists . . . ." (Code Civ. Proc., § 1281.2.) In interpreting a contract, a trial court "should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made." (*Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353, citing Civ. Code, §§ 1636, 1644, 1647.)

The trial court held a hearing on the petition to compel arbitration and thereafter filed a statement of decision, in which it found there was no agreement to arbitrate the dispute in the instant case. The statement of decision reflects that the trial court based its ruling, in part, on its review of the entire Softsmith contract, as well as on the oral presentation at the hearing. The record before us does not contain the complete Softsmith agreement, nor do we have a reporter's transcript of the proceedings before the trial court.

We are now advised that the entire agreement was not presented to the trial court as its statement of decision suggests. Apparently, it reviewed only the portion of the agreement which is in the original record on appeal.[3] We therefore modify our decision to reflect the basis on which we rule.

Appellant vigorously argues that his ability to enforce the arbitration clause in the Softsmith agreement is not precluded by his status as a non-party thereto. However, regardless of the validity of that legal principle, that is not the issue. The issue is whether respondents agreed or intended to waive their right to a jury trial on the claims in dispute herein. The waiver of the consitutional right to jury trial is dependent upon the intent of the party alleged to have waived it.

In Civil Code section 1635 et seq. the Legislature has prescribed rules for the interpretation of contracts. A comprehensive

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[3] Appellant has so advised us in his petition for rehearing. Respondents have not opposed nor contradicted this representation, and we therefore assume it to be correct. Consequently, it is not necessary to review the original superior court file nor to obtain a reporter's transcript of the hearing below. (See, e.g., *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

analysis of those rules is contained in 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts. § 520 et seq. In general, contracts must be interpreted to give effect to the mutual intention of the parties, if such is ascertainable. (Civ. Code, § 1636.) The intention of the parties to written agreements is to be determined, if possible, from the language of the agreement itself. (Civ. Code, §§ 1638, 1639.) The words of a contract are to be understood in their "ordinary and popular sense, rather than according to their strict legal meaning," unless the parties indicate otherwise. (Civ. Code, § 1644.)

The agreements in question are between Softsmith Corporation, a California corporation and the various respondents. They cannot reasonably be intepreted to include or define appellant as a party thereto. The arbitration portion of the agreements refers and applies only to the parties. It provides that certain claims, "*excepting as described below*" are subject to arbitration. Claims involving consequential or punitive damages are specifically not subject to the arbitrators' "authority to award." The agreement does not contain a waiver of punitive or consequential damages, nor a liquidated damages clause.

Although it is clear that appellant is not a party to the contracts in question, he nevertheless asserts a right to enforce the arbitration clause. In support of this assertion he relies on *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406. *Izzy v. Mesquite County Club* (1986) 186 Cal.App.3d 1309 and *Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999. Both *Dryer* and *Berman,* which *Dryer* cites, permitted defendants who were not signatories to contracts containing arbitration clauses to enforce those clauses against signatory plaintiffs. Both cases involved conduct by the non-signatory defendants in performing under the contracts as agents of the signatory contracting defendant, and within the course and scope of their agency. *Izzy* involved similar conduct and relationships, with an additional cause of action for fraud in the inducement to enter into the contract.

By contrast, the complaint in the instant case does *not* allege that appellant *acted* as the agent for Softsmith Corporation, nor that he at any time was acting within the course and scope of any relationship he had with Softsmith. All tortious conduct is alleged

to have occurred prior to execution of the agreements. Further, Softsmith is not a named party defendant. Instead, respondents have alleged that appellant engaged in a fraudulent scheme on his own behalf and to his own profit, to their damage. We cannot construe the Softsmith agreements as encompassing such claims.

Appellant also contends that because the contract involves interstate commerce, arbitration is required by the Federal Arbitration Act contained in Title 9, United States Code, sections 1-14. Title 9 provides, in part, that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controvery thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Federal case law holds that the Federal Arbitration Act created a body of federal substantive law, applicable in state and federal courts. (See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. ____ [87 L.Ed.2d 444, 454-455; 105 S.Ct. 3346, 3354]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 13.) However, before a court applies the Federal Arbitration Act, it must first decide whether a contract exists between the disputing parties. "In determining whether a party is bound by an arbitration agreement, a federal court will look to state contract law principles." (*Wren Distributors, Inc. v. Phone-Mate, Inc.* (E.D.N.Y. 1985) 600 F.Supp. 1576, 1579-1580 and citations therein; see also *Oriental Commercial and Shipping v. Rosseel, N.V.* (S.D.N.Y. 1985) 609 F.Supp. 75, 78; *Hartford Fin. Systems v. Fla. Software Serv., Inc.* (D.Me. 1982) 550 F.Supp. 1079, 1086-1087 and citations therein.) Since that issue has been resolved against him, appellant cannot avail himself of the federal act.

Finally, appellant contends respondents cannot maintain a cause of action for breach of the covenant of good faith and fair dealing against him without acknowledging the existence of a contract between them, and that if they acknowledge the subject contract they are bound by its arbitration clause. We agree. The covenant of good faith and fair dealing is implied in every contract; therefore, a breach thereof is a breach of the contract. (See generally, 1 Witkin, Summary of Cal. Law, *op. cit. supra,*

Contracts, § 576.) Respondents cannot have their cake and eat it too. They may sue appellant individually for fraud, but if they sue for bad faith their action is necessarily based on their contract with Softsmith, and by naming appellant as defendant they concede they are suing him as agent of the corporation and are therefore subject to the provisions of the contract, including the arbitration clause.

For obvious tactical reasons, appellant has not demurred or otherwise moved to eliminate the bad faith cause of action. However, if appellant is not a party to the contract, such cause of action cannot exist. Upon remand it should be stricken.

Judgment affirmed. Petition for rehearing denied.

HANING, J.
Haning, J.

We concur:

LOW, P.J.
Low, P.J.

KING, J.
King, J.

Appendix C

In the Court of Appeal of the State of California
First Appellate District
Division Five
A034243

Roderick L. Cramer et al.,
Plaintiffs and Respondents.

v.

John Martin-Musumeci,
Defendant and Appellant.

Opinion

Alameda County Superior Court
No. 599502-2

[Filed March 12, 1987]
Not To Be Published In Official Reports

Defendant/appellant John Martin-Musumeci appeals from an order denying his petition to compel arbitration brought in response to plaintiffs/respondents' complaints for violation of the California Franchise Investment Act, negligent and intentional misrepresentation, and violation of the covenant of good faith and fair dealing.[1] Appellant contends the subject matter of respondents' actions is subject to arbitration under controlling federal

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[1] Six separate and virtually identical actions were filed against appellant. Plaintiffs/respondents in A034241 are Microsourse, Inc., Kelly Bryan, Martha Bryan, Joseph Knesz and Alma Knesz; in A034243 Roderick L. Cramer, Bona Dee Cramer and Beriyth, a Virginia corporation; in A034498 J.D. Wessling, Caroline Wessling and Westcomp, Inc.; in A034499 Gordon C. Johnson, Allen S. Peterson and Western Compuware, Inc.; in A034502 William E. Hart, Jimmy H. Dunne and Hart's Inc., a Delaware corporation; and in A034503 Softcomp Inc., Pat Connolly and Tom Tejerian.

law, and that denial of his petition would violate the public policy favoring arbitration. We affirm.

Respondents' complaints generally allege that appellant, president of Softsmith Corporation, fraudulently induced them to enter into franchise agreements with Softsmith. The introductory clause of the agreement states: "This agreement is by and between Softsmith Corp., a California corporation, (hereafter 'SMITH') and [name of franchisee]." Two of the six agreements were executed by appellant as president on behalf of Softsmith. Three were executed by the vice-president.[2] On the basis of an arbitration clause in the agreement, appellant demanded arbitration. After respondents refused to arbitrate, appellant filed an answer and petition to compel arbitration. The trial court denied the petition.

The right to a jury trial is guaranteed by Article I, section 16, of the California Constitution. Like most constitutional rights, it can be waived and appellant contends that respondents waived their right to jury trial in their written contract with Softsmith. Respondents are suing appellant, who is not a party to the Softsmith contract, on causes of action based in tort. Whether appellant can invoke the arbitration clause of the Softsmith contract is dependent upon respondents' intent in executing the Softsmith agreement.

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ." (Code Civ. Proc., § 1281.2.) In interpreting a contract, a trial court "should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which

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[2] The partial copy of the agreement between Softsmith and respondent Softcomp in the record before us does not contain an execution by Softsmith, but appellant admits Softsmith entered into a written agreement with Softcomp.

the agreement was made." (*Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353, citing Civ. Code, §§ 1636, 1644, 1647.)

The trial court held a hearing on the petition to compel arbitration and thereafter filed a statement of decision, in which it found there was no agreement to arbitrate the dispute in the instant case. The statement of decision reflects that the trial court based its ruling, in part, on its review of the entire Softsmith contract, as well as on the oral presentation at the hearing. The record before us does not contain the complete Softsmith agreement, nor do we have a reporter's transcript of the proceedings before the trial court.

Error is never presumed, and the burden is on appellant to affirmatively demonstrate error by an adequate record. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 418.) "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (9 Witkin *op. cit., supra,* § 268.) We simply do not have an adequate record before us of all matters which were before the trial court and upon which it based its ruling. As a consequence, we must affirm.

We offer one obvious example of a problem created by an incomplete record. We have before us a portion of the Softsmith agreement which provides that certain claims *"excepting as described below"* (emphasis ours) are subject to arbitration. Since we do not have all that lies "below," we are unable to determine intent from the meager portion of the agreement provided. However, even from the portion of the agreement before us, we note that neither punitive damages nor consequential damages are within the arbitrators' "authority to award." The reference to consequential damages has meaning only with regard to claims arising ex contractu as opposed to those which are ex delicto.

Appellant vigorously argues that his ability to enforce the arbitration clause in the Softsmith agreement is not dependent

upon his status as a non-party thereto. However, regardless of the validity of that legal principle, that is not the issue. The issue is whether respondents agreed or intended to waive their right to a jury trial on the claims in dispute herein. The waiver of the constitutional right to jury trial is dependent upon the intent of the party alleged to have waived it. In the instant case that intent is primarily a factual question to be resolved by the trial court. Without an adequate record of all matters and factors upon which the trial court based its decision, we must presume its ruling is correct.

Appellant also contends that because the contract involves interstate commerce, arbitration is required by the Federal Arbitration Act contained in Title 9, United States Code, sections 1-14. Title 9 provides, in part, that "[a] written provision in . . . a contract evidencing a transaction involving a commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Federal case law holds that the Federal Arbitration Act created a body of federal substantive law, applicable in state and federal courts. (See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. ____ [87 L.Ed.2d 444, 454-455; 105 S.Ct. 3346, 3354]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 13.) However, before a court applies the Federal Arbitration Act, it must first decide whether a contract exists between the disputing parties. "In determining whether a party is bound by an arbitration agreement, a federal court will look to state contract law principles." (*Wren Distributors, Inc. v. Phone-Mate, Inc.* (E.D.N.Y. 1985) 600 F.Supp. 1576, 1579-1580 and citations therein; see also *Oriental Commercial and Shipping v. Rosseel, N.V.* (S.D.N.Y. 1985) 609 F.Supp. 75, 78; *Hartford Fin. Systems v. Fla. Software Serv., Inc.* (D.Me. 1982) 550 F.Supp. 1079, 1086-1087 and citations therein.) Since that issue has been resolved against him, appellant cannot avail himself of the federal act.

Appellant also contends respondents cannot maintain a cause of action for breach of the covenant of good faith and fair dealing against him without acknowledging the existence of a contract

between them, and that if they acknowledge the contract they are bound by its arbitration clause. We agree. The covenant of good faith and fair dealing is implied in every contract; therefore, a breach thereof is a breach of the contract. (See generally, 1 Witkin, Summary of Calif. Law, § 576.) Respondents cannot have their cake and eat it too. They may sue appellant individually for fraud, but if they sue for bad faith their action is necessarily based on their contract with Softsmith, and by naming appellant as defendant they concede they are suing him as agent of the corporation and are therefore subject to the provisions of the contract, including the arbitration clause.

For obvious tactical reasons, appellant has not demurred or otherwise moved to eliminate the bad faith cause of action. However, if appellant is not a party to the contract, such cause of action cannot exist. Upon remand it should be stricken.

Judgment affirmed.

HANING, J.
Haning, J.

We concur:

LOW, P.J.
Low, P.J.

KING, J.
King, J.

Appendix D

Order Denying Review

After Judgment by the Court of Appeal

1st District, Division 5, No. A034243

S000683

In the Supreme Court of the State of California

In Bank

[Filed May 27, 1987]

Cramer et al., *Respondents,*

v.

Martin-Musumeci, *Appellant.*

Appellant's petition for review DENIED.

LUCAS
Chief Justice

Appendix E

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Attorneys for Plaintiffs

Superior Court, State of California
County of Alameda

No. 599502-2

Roderick L. Cramer, Bona Dee Cramer, and
Beriyth Corporation, a Virginia corporation,
Plaintiffs,

vs.

John Martin-Musumeci,
Does 1 through 30, inclusive,
Defendants.

Order Re Petition to Compel Arbitration
and Stay Proceedings

—[Filed Dec. 31, 1985]

The petition of defendant John Martin-Musumeci to compel arbitration and stay proceedings in the above-referenced action came on regularly for hearing before the Honorable Winton McKibben, on November 18, 1985 in Department #1 of the above-entitled court.

Linda R. Katzen of the law firm of Belzer, Jackl, Katzen, Hulchiy, Murray & Balamuth appeared for plaintiffs. Drew H. Trott of Cooper, White & Cooper appeared for defendant John Martin-Musumeci.

Good cause appearing to the satisfaction of the court, it is hereby ordered:

Defendant Martin-Musumeci's petition to compel arbitration and stay proceedings is hereby denied. Defendant Martin-Musumeci shall take nothing by his petition. Each party shall bear their own costs with respect to said petition.

DATED: December 31, 1985

By /s/ WINTON MCKIBBEN
Judge Winton McKibben
Judge of the Superior Court

Approved as to form.

DATED: December 26, 1985

COOPER, WHITE & COOPER

By /s/ ANDREW H. TROTT
Andrew H. Trott

Appendix F

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Superior Court, State of California
County of Alameda

No. 599502-2
Roderick L. Cramer, Bona Dee Cramer, and Beriyth Corporation, a Virginia corporation,

vs.

John Martin-Musumeci, Does 1 through 30, inclusive,
Defendants.

STATEMENT OF DECISION

[Filed Jan. 23, 1986]

The following statement of decision is made in response to the Request for Statement of Decision by defendant John Martin-Musumeci, pursuant to Code of Civil Procedure Section 1291:

1. Whether the arbitration agreement (Article 20 of the agreement attached as Exhibit to the Petition to Compel Arbitration, filed October 29, 1985) was binding on the plaintiffs herein and, if such agreement was not binding on plaintiffs (or any of them), why not.

The contract in question is one between plaintiffs and Softsmith Corporation. Article 20 in the contract is a provision requiring arbitration between the parties to the contract of their disputes arising out of the contract. This arbitration clause, however, does not bind plaintiffs to arbitrate disputes with persons who are not parties to the contract. Defendant John Martin-Musumeci is not a party to the contract and therefore Article 20

of the contract does not bind plaintiffs to arbitrate their disputes with him.

2. Whether the *subject matter* of this lawsuit (irrespective of the parties) is of the type governed by the arbitration agreement.

The subject matter of this lawsuit is the alleged fraudulent conduct of defendant John Martin-Musumeci. The allegedly fraudulent conduct of John Martin-Musumeci is not a subject governed by the Article 20 arbitration clause.

3. Whether defendant John Martin-Musumeci lacked standing to enforce the arbitration agreement and, if so, why.

Yes. Defendant John Martin-Musumeci is not a party to the contract which contains the arbitration clause in Article 20 and therefore is not entitled to arbitration of plaintiffs' claims against him.

4. Whether defendant's evidentiary objection to plaintiffs' declarations of subjective intent was well taken.

Yes.

5. Whether plaintiffs' declarations of subjective intent were material to the issues before the court.

No.

6. Whether plaintiffs' declarations of subjective intent furnished support for denial of the relief sought by defendant.

No.

7. Whether considerations of fairness or equity were material to the issues before the court and, if so, in what regard.

Defendant John Martin-Musumeci sought specific performance of the arbitration clause in the contract between plaintiffs and Softsmith Corporation. Specific performance actions are equitable in nature and therefore considerations of fairness and equity are material to the issues before the court.

8. Whether enforcement of the arbitration agreement in the present case would be unfair, unjust, or inequitable and, if so, in what regard.

Yes. There is no agreement between plaintiffs and defendant John Martin-Musumeci to arbitrate anything. John Martin-Musumeci cannot be bound to arbitrate with plaintiffs, nor can he be bound to any of the obligations of Softsmith Corporation contained in the subject contract.

9. Whether it can be said with positive assurance that plaintiffs have not agreed to arbitrate the instant claims.

The court does not agree that it is necessary for it to determine with "positive assurance" that plaintiffs have not agreed to arbitrate the instant claims with defendant John Martin-Musumeci. Therefore, whether it can be said "with positive assurance that plaintiffs have not agreed to arbitrate the instant claims" is irrelevant.

10. Whether the applicable law requires that in order to enforce an abritration agreement, the person seeking to do so must be a party to such agreement.

Yes.

11. Whether the applicable law requires that, in order to be enforceable, an arbitration provision must be binding on the person seeking enforcement.

Yes.

12. Whether the arbitration clause involved in this case was binding on defendant John Martin-Musumeci.

No.

13. What evidence supported the determination that plaintiffs are not required to arbitrate the instant claims.

There is no agreement to arbitrate the instant claims. The evidence supporting this conclusion is the fact that the only evidence to support the existence of such an agreement is a contract between plaintiffs and Softsmith Corporation, an entity which is not a party to the lawsuit. In interpreting the contract, there is no language including John Martin-Musumeci in the contract, nor specifically including him in the arbitration clause. The arbitration clause was drafted by John Martin-Musumeci through his agents and is extensive and detailed. The contract

between plaintiffs and Softsmith is itself detailed, specifying the business relationships between plaintiffs and Softsmith. It is thus unreasonable to interpret the contract as binding plaintiffs to arbitrate their claims against John Martin-Musumeci when the contract is completely devoid of any language so stating or any language incorporating the officers, employees, agents and directors of Softsmith into its terms. The express, non-ambiguous language of the agreement establishes that there in fact was no agreement by the parties to the contract to make John Martin-Musumeci a party to the agreement or any part of it.

14. What authorities supported the conclusion that plaintiffs are not required to arbitrate the instant claims.

Rules of contract interpretation, *Wren Distributors, Inc. v. Phone-Mate, Inc.* (1985) (E.D. New York) 600 F. Supp. 1576, 1580; *Hartford Fin. Systems v. Fla. Software Serv., Inc.* (1982) (D. Maine) 550 F. Supp. 1079, 1086-87; *Zumwalt v. Schwartz* (1931) 112 Cal.App. 734; California Civil Code Section 2343(3); *Freeman v. State Farm* (1975) 14 Cal.3d 473; *Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353; *Rhoades v. California Hospital Medical Center* 76 Cal.App.3d 606; *Janmort Leasing, Inc. v. Econo-Car International, Inc.* (1979) (E.D. New York) 475 F. Supp. 1282; *ATSA of California, Inc. v. Carnel Insurance Company* 702 F.2d 172, (9th Cir. 1983); *Southern California Pipe Trade Dist. Council No. 16 v. Merritt* (1981) 126 Cal.App.3d 530; *Okcuoglu v. Hess, Grant and Company, Inc.* (E.D. Penn. 1984) 580 F.Supp. 749.

15. Whether or not federal law governs the interpretation of the arbiration agreement involved in this case.

Federal law only governs the interpretation of the arbitration agreement once it is established that there is an arbitration agreement between the parties. As noted, the court finds that there is no arbitration agreement between the parties to this action. The law for determining whether there is an agreement to arbitrate, is California law. However, the court finds that under both federal law and California law, the interpretation of the purported arbitration agreement is the same and that it is not an

arbitration agreement between plaintiffs and John Martin-Musumeci.

16. Whether or not federal law governs the enforceability of the arbitration agreement involved in this case.

Federal law only governs the interpretation of the arbitration agreement once it is established that there is an arbitration agreement between the parties. As noted, the court finds that there is no arbitration agreement between the parties to this action. The law for determining whether there is an agreement to arbitrate, is California law. However, the court finds that under both federal law and California law, the interpretation of the purportred arbitration agreement is the same and that it is not an arbitration agreement between plaintiffs and John Martin-Musumeci and therefore is not enforceable in this action.

17. Whether the agreement of which the arbitration clause is a part involves "commerce" for purposes of the Federal Arbitration Act, 9 U.S.C., §§ 3 *et seq.*

The court does not find it necessary to reach this question because the agreement in question is between plaintiffs and an entity which is a stranger to this litigation.

DATED: January 23, 1986.

WINTON McKIBBEN
Winton McKibben
Judge of the Superior Court

9 United States Code §§ 2, 3, 4.

§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. *Stay of proceedings where issue therein referable to arbitration.*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-330

In The

Supreme Court of the United States

October Term, 1987

JOHN MARTIN-MUSUMECI,

Petitioner,

vs.

RODERICK L. CRAMER, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

WM. BARRY BALAMUTH*
WILLIAM J. MURRAY
LINDA R. KATZEN
NICHOLAS P. HULCHIY

BELZER, JACKL, KATZEN,
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Counsel for Respondents

*Counsel of Record

November 10, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

LIST OF PARTIES

This petition relates to six separate but identical proceedings in which petitioner was the appellant before the court below. Each respondent named herein was a respondent in one of those six proceedings. The parties to the proceedings below were the petitioner herein, John Martin-Musumeci, and respondents herein were as follows: Roderick L. Cramer, Bona Dee Cramer, Beriyth Corporation (Appeal No. A034241); Microsource, Inc., Kelly Bryan, Martha Bryan, Joseph Knesz, Alma Knesz (Appeal No. A034243); J.D. Wessling, Caroline Wessling, Wesscomp, Inc. (Appeal No. A034498); Gordon C. Johnson, Allen S. Peterson, Western Compuware, Inc. (Appeal No. A034499); William E. Hart, Jimmy H. Dunne, Hart's Inc. (Appeal No. A034502); Softcomp, Inc., Pat Connolly, Tom Tjerian (Appeal No. A034503).

All parties to the proceedings below are before this Court.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. THE CALIFORNIA COURT OF APPEAL DECISION WOULD NOT CATEGORICALLY DENY THE BENEFITS OF THE FEDERAL ARBITRATION ACT TO EMPLOYEES OF PARTIES TO ARBITRATION AGREEMENTS 4

a) There is no Conflict with Federal Precedent in Holding that no Contract to Arbitrate was Made Between Petitioner and Respondents;

b) Where no Contract Between the Parties was Formed, no Public Policy Favoring Arbitration is Violated by Refusing to Compel Parties to Arbitrate; and,

c) The California Court's Decision Does Not Nullify the Federal Arbitration Act as to Claims Brought Against Employees In State Court 4

II. THE ISSUE AS TO THE SCOPE OF THE ARBITRATION PROVISIONS NEED NOT BE REACHED WHERE THE COURT HAS DETERMINED THAT PETITIONER WAS NOT A PARTY TO ANY ARBITRATION AGREEMENT 9

III. THE COURT OF APPEAL DID NOT RELY ON THE UNIQUENESS OF THE ARBITRATION AGREEMENT NOR CARVE OUT AN EXCEPTION FOR ARBITRATION AGREEMENTS IN RENDERING ITS DECISION 10

APPENDIX 1A

TABLE OF AUTHORITIES

Page(s)

CASES

Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985) 5

Davis v. Chevy Chase Financial Ltd., 667 F.2d 160 (D.C. Cir. 1981) 8

Freeman v. State Farm Mutual Automobile Insurance Co., 14 Cal.3d 473 (1975) 8

Hartford Financial Systems v. Florida Software Services, Inc., 550 F.Supp. 1079 (D.Maine 1982) 6

Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2d Cir. 1987) 8, 9

Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1187-88 (9th Cir. 1986) 5

Merrill Lynch, Pierce Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1288-89 (8th Cir. 1984) 5

Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 7

Moruzzi v. Dynamics Corp. of America, 443 F. Supp. 332 (S.D.N.Y. 1977) 8

Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1 (1982) 7

Oriental Commercial and Shipping v. Rossell N.Y., 609 F.Supp. 75 (D.C.N.Y. 1985) 6

Perry v. Thomas, 107 S.Ct. 2520, 96 L.Ed. 2d 426, 55 U.S.L.W. 4832, 4835 (U.S. June 15, 1987) 8

Seaboard Coast Line Railroad Co. v. Trailer Train Co., 690 F.2d 1343 (11th Cir. 1982) 8

Southland Corp. v. Keating, 465 U.S. 1 (1984) 7

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Weeks v. Crow, 113 Cal.App.3d 350 (1980) 8

Wren Distributors, Inc. v. Phone-Mate, Inc., 600 F.Supp. 1576 (E.D.N.Y. 1985) 6

STATUTES

Cal. Civ. Proc. Code § 1281.2 (Deering 1981) 6

Cal. Civ. Code § 1636 (Deering 1971) 6

Cal. Civ. Code § 1654 (Deering 1971) 6

No. 87-330

In The

Supreme Court of the United States

October Term, 1987

JOHN MARTIN-MUSUMECI,

Petitioner,

vs.

RODERICK L. CRAMER, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

STATEMENT OF THE CASE

Respondents herein are groups of individuals solicited by promoter John Martin-Musumeci to purchase franchises of what was purported to be a nationwide consumer software distribution network, Softsmith Corporation (hereinafter "Softsmith").

During the course of promoting this enterprise, petitioner made numerous misrepresentations to respondents,

including, principally, the extent of his personal wealth and financial stability and his ability, willingness, and commitment to contribute his personal wealth to ensure the success of Softsmith. In connection with his promotion, petitioner further misrepresented the financial condition and stability of Softsmith, its projected operations, performance, and profitability.

As a direct result of their reliance on petitioner's misrepresentations, respondents each executed a lengthy franchise agreement with Softsmith. They did so believing that Softsmith was personally backed by petitioner and was therefore capable of weathering anticipated fluctuations in the relatively new consumer software market. Softsmith was, in fact, severely undercapitalized and almost immediately began to encounter financial difficulties. Petitioner was unwilling or unable to lend his financial support to Softsmith and it suffered a swift and complete failure. As a direct result of Petitioner's misrepresentations, respondents paid and lost substantial sums in franchise fees and monies advanced for inventory.

The arbitration clause petitioner wishes to enforce is part of the agreement entered into between respondents and Softsmith. It has been reviewed and consistently interpreted by the California courts not to include petitioner as a party.

The trial court reviewing the agreement determined that under both federal and California law petitioner was not a party, and not intended to be a party, to the agreement, and that neither petitioner nor respondent could compel arbitration between them under its terms. (Statement of Decision, Petition for Writ of Certiorari, pp. 16A-19A.)

The court of appeal affirmed the trial court's decision holding that the mutual intention of the parties was not to include petitioner as a party to the agreement (Opinion, Pet., p. 5A.) The court found that any actions arising in this litigation did not involve petitioner's acts as an agent or employee of Softsmith. (Opinion, Pet., pp. 5A-6A.)

The court further found that the alleged acts and misrepresentations occurred prior to the execution of the agreement during which time petitioner was allegedly engaged in a fraudulent scheme on his own behalf and for his own profit (*Id.*)

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REASONS FOR DENYING THE PETITION

There is no good reason for this Court to disturb the ruling of the lower courts.

The court of appeal decison would not categorically deny the benefit of the Federal Arbitration Act to employees of parties to an arbitration agreement.

First, the ruling below was based on a finding by the trial court, using well-established state contract law principles, that respondents and Softsmith did not intend to include petitioner as a party to the agreement. Absent the requisite intent, there is no agreement between petitioner and respondents. Respondents therefore cannot be compelled to arbitrate their claims against petitioner.

The California court's application of state contract law principles in deciding whether an agreement was

reached between the parties is fully supported by federal precedent.

Second, there is no policy favoring the extension of an arbitration agreement to persons who have not agreed to submit disputes between themselves to arbitration. Neither is there policy favoring the extension of an arbitration agreement to persons who were not intended to be parties to the agreement.

Finally, any concern that the court of appeal decision would nullify the Federal Arbitration Act as to claims brought against employees in state court is unfounded. Employees who demonstrate that they are either parties to an agreement or intended to be parties to an agreement whose arbitration clause they seek to invoke are not denied the benefits of the Federal Arbitration Act.

I.

THE CALIFORNIA COURT OF APPEAL DECISION WOULD NOT CATEGORICALLY DENY THE BENEFITS OF THE FEDERAL ARBITRATION ACT TO EMPLOYEES OF PARTIES TO ARBITRATION AGREEMENTS

a) There is no conflict with Federal precedent in holding that no contract to arbitrate was made between petitioner and respondents.

b) Where no contract between the parties was formed, no public policy favoring arbitration is violated by refusing to compel parties to arbitrate.

c) The California court's decision does not nullify the Federal Arbitration Act as to claims brought against employees in state court.

Petitioner argues that the court of appeal decision would categorically deny the benefit of the Federal Ar-

bitration Act to employees of parties to arbitration agreements. Petitioner bases this argument on the following premise: "The court of appeal held, as a matter of state law, that a non-party employee may not enforce an arbitration agreement." (Pet., p. 6.) This premise is incorrect. The court of appeal held that where a non-signatory employee was not intended by the parties to the arbitration agreement to be a party to that agreement, the employee could not compel arbitration. (Opinion, Pet., pp. 5A-6A.) In doing so, the state court did not deny the benefit of the Federal Arbitration Act to either signatory employees or non-signatory employees who were intended by the parties of the arbitration agreement to be included.

Correctly read, the California appeal court decision is not in conflict with the cases cited by petitioner at pages six and seven of his brief. In each of those cases, all involving stock brokerages, the court determined that the party opposing arbitration was either a party to an arbitration agreement or intended to be covered by the arbitration agreement.[1]

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[1] In *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986) the court noted that all of the alleged wrongful acts by the non-signatory employees related to their handling of plaintiff's securities account and that the signatory broker had clearly indicated its intention to protect its employees through the customer agreement.

In *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 937 (3d Cir. 1985) the court found Barrowclough to be a party to the agreement compelling arbitration.

In *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1288-89 (8th Cir. 1984) the court found that three

(Continued on following page)

The issue of whether a party is bound to an arbitration agreement is determined by reference to state contract law principles. *Wren Distributors, Inc. v. Phone-Mate, Inc.*, 600 F.Supp. 1576 (E.D.N.Y. 1985).[2] Accordingly, the California courts have acted in consonance with federal precedent by applying state contract law principles which hold that absent an ascertainable agreement to arbitrate, one cannot be compelled to arbitrate.[3] Applying these principles, the lower courts found that petitioner was not a party to the agreement and not intended to be a party to the agreement.

The facts support this finding. The subject franchise agreement is a sophisticated ninety-one page document detailing virtually every aspect and contingency of the relationship between respondents and Softsmith. It has never been disputed that petitioner caused the agreement to be drafted yet the agreement never mentions petitioner by name or reference. Neither the agreement nor its arbitration clause specifically or generally references officers, directors or employees of Softsmith as parties to any

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(Continued from previous page)

employees were entitled to arbitration under exchange rules governing disputes arising out of the employment relationship while two employees who were not members of the stock exchange were entitled to arbitration under a provision of the exchange constitution which allowed non-members to compel arbitration.

[2] *Hartford Financial Systems v. Florida Software Services, Inc.*, 550 F.Supp. 1079, 1086-87 (D.Maine 1982); *Oriental Commercial and Shipping Co., Ltd. v. Rosseel*, 609 F.Supp. 75, 78 (S.D.N.Y. 1985).

[3] Cal. Civ. Proc. Code § 1281.2 (Deering 1981), reprinted in the Appendix hereto, pp. 1A-2A; Cal. Civ. Code § 1636, et seq. (Deering 1971), pp. 2A-3A, infra; Cal. Civ. Code § 1654 (Deering 1971), p. 4A, infra.

arbitration. The agreement anticipates future litigation in such areas as restraint of trade and securities violations. Such a sophisticated, lengthy document cannot be said to inferentially include petitioner as a party to the agreement. Had the parties intended to include petitioner within the agreement, it would have been a simple matter to do so.

Petitioner asserts " . . . this Court, and the courts of appeal for several circuits, have expressly held that the arbitrability of a particular dispute is determined according to federal substantive law." (Pet., p. 7.) The cases cited by petitioner for this proposition are clearly distinguishable. In each of those cases there was no issue as to whether a party to the litigation was a party, or intended to be a party, to the arbitration agreement. Instead, the courts in those cases addressed the scope of issues covered by an agreement between the parties.[4]

Respondents concede that the Federal Arbitration Act expresses a strong federal policy favoring enforcement of arbitration agreements, and prohibits states from denying arbitration of a dispute which is within the scope

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[4] E.g., in *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1982) this Court addressed the exceptional-circumstances argument in the context of a construction agreement between the parties.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984) this Court addressed the supremacy clause in light of the conflict between the Federal Arbitration Act and the California Franchise Investment Law in the context of a franchise agreement between the parties.

In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court addressed the issue as to whether anti-trust claims were encompassed within the scope of a sales agreement between the parties containing an arbitration provision.

of such an agreement. Policy considerations, however, do not come into play absent a preliminary finding of an agreement between the parties. A court must first determine whether the parties agreed to arbitrate. Only thereafter must a court determine the scope of the agreement. *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987).

This Court has held that an "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit" *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). The Federal Arbitration Act does not preclude parties from contractually limiting the scope of their arbitration agreement.[5] Arbitration, however favored by the courts and the Congress, is a contractual right. It may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration. *Moruzzi v. Dynamics Corporation of America*, 443 F.Supp. 332, 334 (S.D.N.Y. 1977).[6] Federal policy cannot serve to stretch a contract beyond the scope intended by its parties. *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982).

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[5] *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348, 1352 (11th Cir. 1982); *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981); See also *Perry v. Thomas*, 107 S.Ct. 2520, 96 L.Ed.2d 426, 55 U.S.L.W. 4832, 4835 (U.S. June 15, 1987), fn. 9 wherein this Court, in dicta, references the application of state law to determine the validity, revocability, and enforceability of contracts generally and the application of federal law to issues unique to arbitration agreements, e.g., unconscionability.

[6] California law is consistent in this regard. *Freeman v. State Farm Mutual Automobile Insurance Co.*, 14 Cal.3d 473, 479 (1975); *Weeks v. Crow*, 113 Cal.App.3d 350, 352-3 (1980).

Petitioner asserts the "court of appeal's decision would fortuitously deny enforcement of an arbitration agreement in those cases where an employee of a party to the agreement is available to be sued in state court, even though the dispute is plainly within the scope of the arbitration agreement." (Pet., p. 8.) This unsupported assertion is incorrect. Correctly and fairly read, the decision would have no adverse effect on an employee's right to benefits under the Federal Arbitration Act where the employee is a party to an arbitration agreement or where the parties to the agreement intended for the employee to be a party thereto. On the other hand, petitioner's argument, if applied as petitioner urges, would mandate that non-signatory employees be permitted to compel arbitration in every case, regardless of the intent of the parties to the arbitration agreement. This application is unsupported by legal precedent.

II.

THE ISSUE AS TO THE SCOPE OF THE ARBITRATION PROVISIONS NEED NOT BE REACHED WHERE THE COURT HAS DETERMINED THAT PETITIONER WAS NOT A PARTY TO ANY ARBITRATION AGREEMENT

The Court of Appeal upheld the finding of the trial court that petitioner was not a party to the agreement and not intended to be a party to the agreement. This threshold issue having been resolved against petitioner, it is not necessary to determine the scope of the agreement.[7] In focusing his arguments on the scope of the is-

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[7] *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987).

sues to be arbitrated under the terms of the agreement and ignoring the findings by the lower courts, petitioner obfuscates the holding below and attempts to create an issue on appeal where none exists.

Petitioner states that the court of appeal resolved the issue, " . . . on the superficial, simplistic basis that petitioner was not expressly named in the Agreements." (Pet., p. 9.) Such a reading of the opinion is itself superficial and simplistic. The court of appeal affirmed and articulated the trial court's analysis of the numerous factors governing the interpretation of the agreement under contract principles, including the intention of the parties. (Opinion, Pet. pp. 4A-5A.) The opinion cannot be fairly read as limited to whether petitioner was or was not expressly named in the agreement.

III.

THE COURT OF APPEAL DID NOT RELY ON THE UNIQUENESS OF THE ARBITRATION AGREEMENT NOR CARVE OUT AN EXCEPTION FOR ARBITRATION AGREEMENTS IN RENDERING ITS DECISION

Although the court of appeal references California constitutional guarantees of the right to a jury trial, the court does not base its holding specifically on that ground. Its decision can be and is supported on more general grounds, i.e., that petitioner was not a party to the agreement. Specifically, the court observed its duty to examine the intent of the parties " . . . in light of the usual and ordinary meaning of contractual language and circumstances under which the agreement was made." (Opinion, Pet., p. 4A.) The court of appeal specifically noted:

> In Civil Code section 1635 et seq. the Legislature has presented rules for the interpretation of contracts. A comprehensive analysis of those rules is contained in 1 Witkin, *Summary of Cal. Law*, (8th ed. 1973) Contracts §§ 520 et seq. In general, contracts must be interpreted to give effect to the mutual intention of the parties, if such is ascertainable. (Civ. Code § 1636.) The intention of the parties to written agreements is to be determined, if possible, from the language of the agreement itself. (Civ. Code, §§ 1638, 1639.) The words of a contract are to be understood in their "ordinary and popular sense, rather than according to their strict legal meaning," unless the parties indicate otherwise. Civ. Code, § 1644.)
>
> The agreements in question are between Softsmith Corporation, a California corporation and the various respondents. They cannot reasonably be interpreted to include or define appellant as a party thereto. The arbitration portion of the agreements refers and applies only to the parties. It provides that certain claims, "*excepting as described below*" are subject to arbitration. Claims involving consequential or punitive damages are specifically not subject to the arbitrator's "authority to award." The agreement does not contain a waiver of punitive or consequential damages, nor a liquidated damages clause. (Opinion, Pet., pp. 4A-5A.) (Emphasis in original)

This language and similar language throughout the opinion clearly evidences that the Court of Appeal did not rely on uniqueness of the arbitration agreement nor carve out an exception for arbitration agreements. It simply applied general contract principles.

Contrary to petitioner's assertion, no special obstacles to enforcement of an arbitration agreement are created by the court's holding. The threshold question at

the appellate level, as at every lower court level, has been a determination, applying general contract principles, of whether the parties herein actually entered into an agreement to arbitrate. The Court having found that petitioner was not a party to the franchise agreement and having found no intent by respondents and Softsmith to include petitioner as a party to the agreement, there is simply no agreement to arbitrate which petitioner is entitled to compel.

The California courts have analyzed the entirety of the franchise agreement, applied it to the facts of the underlying dispute, and in accordance with state and federal law have determined the threshold question adverse to petitioner. The petition should be denied.

Respectfully submitted,

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Dated: November 10, 1987

(Appendix follows)

APPENDIX

California Code of Civil Procedure § 1281.2.

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may de-

lay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party a sset forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

California Civil Code § 1636.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

California Civil Code § 1637.

For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied.

California Civil Code § 1638.

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

California Civil Code § 1639.

When a contract is reuced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title.

California Civil Code § 1640.

When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

California Civil Code § 1641.

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

California Civil Code § 1644.

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

California Civil Code § 1646.

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

California Civil Code § 1647.

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

California Civil Code § 1648.

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

California Civil Code § 1654.

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.